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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 72-103

THOMAS LLERENA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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NO. _____

THOMAS LLERENA,

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vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner Thomas Llerena prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on May 11, 1972.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, appears in the appendix (App. A, pp. 1-9). The judgment and commitment entered by the United States District Court for the Southern District of Florida is unreported and appears in the appendix (App. D, pp. 12, 13).

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on May 11, 1972 (App. B, p. 10). A timely petition for rehearing was denied on June 19, 1972 (App. C, p. 11). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the decision of the Fifth Circuit conflicts with prior decisions of other Courts of Appeals on the matter of misjoinder of defendants under Rule 8(b), F.R. Cr.P., where petitioner and a codefendant are charged in a conspiracy count involving distribution of two kilograms of cocaine and only the codefendant is charged in a substantive count to distribute 3.6 grams of heroin, the latter charge being totally unconnected to the transaction involving the conspiracy.

2. Whether §401(a)(1) and §406 of Title II of the Comprehensive Drug Abuse, Prevention and Control Act of 1970 (21 U.S.C. §841(a)(1) and §846) are unconstitutional by reason of said sections not being within the power of Congress to enact under the Commerce Clause, Article I, §8, of the Constitution and as being an invasion of the States' residual police powers contrary to the Tenth Amendment.

(a) Whether Congress exceeded the power granted by the Commerce Clause by prohibiting and making unlawful particular activities in controlled substances without requiring both allegation and proof that the particular activity involved in each individual case has affected interstate commerce.

(b) Whether there was no rational basis for the Congressional findings and declarations set forth in Title II of the Act (21 U.S.C. §801).

CONSTITUTIONAL PROVISIONS INVOLVED

Article, I, §8, Clause 3. The Congress shall have power * * * To regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes.

10th Amendment. The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

FEDERAL RULE OF CRIMINAL PROCEDURE

Rule 8(b) *Joinder of Defendants.* Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

STATEMENT OF THE CASE

Petitioner is charged together with one Amado Lopez in count I of a three count indictment with conspiring to possess with intent to distribute approximately two kilograms of cocaine, in violation of §401(a)(1) of Title II of the Comprehensive Drug Abuse, Prevention and Control Act of 1970, 21 U.S.C. §841(a)(1) and with committing certain overt acts in furtherance of the conspiracy, in violation of §406 of the same Act, 21 U.S.C. §846.[1] Although the conspiracy is alleged to have taken place from May 6, 1971, until July 19, 1971, all the overt acts occurred on and subsequent to July 3, 1971 (App. E, pp. 14, 15).

Counts II and III are substantive counts in which the petitioner is not charged. In count II, Amado Lopez is charged with knowingly and intentionally distributing approximately two kilograms of cocaine on or about July 3, 1971 (App. E, p. 15).

Misjoinder of Defendants

Amado Lopez is charged in count III with knowingly and intentionally distributing approximately 3.6 grams of heroin on or about May 6, 1971 (App. E, pp. 15, 16).

Petitioner filed his motion for a severance alleging a misjoinder of defendants in that count III of the indictment charged Lopez with the offense of the distribution of a small quantity of heroin, which count neither arose out of the conspiracy nor was connected with the conspiracy (R. 557, 558).[2] The petitioner's motion for a severance was renewed at the commencement of the trial and was denied as was the written motion for a severance (R. 9-12, 561).

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[1]Sections 841(a)(1) and 846 of Title 21 are set forth in Appendix A, p. 2, *infra*. The indictment is set forth in full in Appendix E, pp. 14-15, *infra*.

[2]Reference is made to the actual pages of the original record-on-appeal filed in the Fifth Circuit.

Constitutional Issue

Petitioner's pretrial motion to dismiss the indictment alleged, inter alia, that §§841(a)(1) and 846 of Title 21, violated Article I, Section 8 and also the Tenth Amendment of the Constitution (R. 515, 516). The challenge to the constitutionality of §§841(a)(1) and 846, *supra*, was denied by the District Judge.

Trial by jury was had in the United States District Court for the Southern District of Florida, and the jury returned its verdict, finding the petitioner guilty of Count I, and Lopez guilty of Counts I, II and III. Petitioner was sentenced to confinement for a period of 18 months on Count I (App. A, p. 2).

Briefly, the facts adduced at the trial disclosed that a government informant, Juan Mesa, approached Lopez, and after various meetings between the two, Lopez gave two kilos of cocaine to Mesa on July 3, 1971 (R. 50, 51, 76). On July 16, 1971, Mesa arranged a meeting with Lopez at a bar in the McAllister Hotel in Miami (R. 253, 254). At this meeting Mesa, together with an undercover agent named Roque of the Bureau of Narcotics and Dangerous Drugs met with Lopez. Lopez came to this meeting with the petitioner (R. 277-279). Agent Roque gave money to Lopez on behalf of Mesa (R. 282). Roque was asked whether his investigation revealed that petitioner gave any narcotics to Mesa or received any money for any narcotics. The agent replied: "We had reason to believe that he was involved, let's put it that way." (R. 204).

REASONS FOR GRANTING THE WRIT

1. The Supreme Court has jurisdiction to review by Certiorari a decision of the Fifth Circuit directly conflicting with decisions of other Courts of Appeals on the issue of misjoinder of defendants under Rule 8(b) F.R. Cr.P. where petitioner and a codefendant are charged in a conspiracy count involving distribution of two kilograms of cocaine and only the codefendant is charged in a substantive count to distribute 3.6 grams of heroin, the latter charge being totally unconnected with the transaction involving the conspiracy.

The Fifth Circuit, concerning itself only with the challenge to the constitutionality of certain sections of the Comprehensive Drug Abuse, Prevention and Control Act of 1970, summarily disposed of the issue of the misjoinder of defendants, contrary to Rule 8(b), *supra*, with the terse comment "no merit" (App. A, p. 3).

The indictment is a simple one. In count I it charges petitioner and Amado Lopez with conspiring to possess with intent to distribute two kilograms of cocaine. This conspiracy allegedly occurred between May 6, 1971 and July 19, 1971. The overt acts allegedly took place from July 3, 1971, until July 19, 1971.

Count II charged only Lopez with distributing two kilograms of cocaine on July 3, 1971. This substantive count involved a transaction which was connected to and related to the conspiracy count.

In count III, only Lopez was charged with distributing 3.6 grams of heroin on May 6, 1971. Nowhere in the indictment is it alleged that petitioner participated jointly with Lopez in the May 6, 1971, heroin transaction. No amount of judicial gymnastics could make the heroin count a part of the same act or transaction as the conspiracy to distribute two kilograms of cocaine.

Thus the Fifth Circuit's decision and judgment that there was no misjoinder of defendants under Rule 8(b), *supra*, directly collides with numerous decisions from other Courts of Appeals on the same matter, as will be shown, *infra*.

For example, in an opinion authored by Judge Burger in *Ward v. United States*, D.C. Cir. 1970, 289 F.2d 877, the District of Columbia Circuit held that Rule 8(b), F.R. Crim. P., does not permit multiple defendants to be charged in the same indictment with offenses not connected. In *Ward* the appellant was indicted jointly with one Lyons in three counts for a narcotics sale on September 1, 1959. Appellant was also indicted and tried alone on three counts for narcotics sales on July 31, 1959. In a separate count Lyons was indicted for a narcotics offense on December 11, 1959.

The indictment did not allege that the transactions were connected or that they were pursuant to a conspiracy. In like manner, the indictment in the case, *sub judice*, although charging a conspiracy involving two kilograms of cocaine does not allege that the sale of a small quantity of heroin by Lopez was connected to the conspiracy. Judge Burger citing Rule 8(b), *supra*, stated that since the indictment did not allege that Lyon's sale of narcotics on

December 11, 1959, was in any way related to the other counts linking the two defendants, that the defendant's motion for a severance was erroneously denied.

Then the Court in *Ward* held: "[W]here multiple defendants are charged with offenses in no way connected, and are tried together, they are prejudiced by that very fact, and the trial judge has no discretion to deny relief."

Another conflicting decision is *Chubet v. United States*, 8 Cir. 1969, 414 F.2d 1018. In a multicount indictment involving the illegal possession and sale of amphetamine tablets in violation of the Federal Food, Drug and Cosmetic Act, Chubet was charged in two counts of a six count indictment with one Kauffmann, for the sale of amphetamine tables on February 21, 1967. Chubet was convicted on the two counts together with Kauffmann. Kauffmann was also charged with others not including Chubet with sale of amphetamine tablets on other dates in February and March of 1967.

The Eighth Circuit following the reasoning in *Ward*, *supra*, held that although Kauffmann and Chubet were common participants in two counts there was no allegation linking Chubet with the other counts involving Kauffmann.

Accordingly, since the information neither alleged that the transactions were connected nor that they were common to a conspiracy, the Eighth Circuit reversed the conviction of Chubet for improperly joining him contrary to Rule 8(b), F.R. Crim. P.

In *United States v. Eagleston*, 10 Cir. 1969, 417 F.2d 11, Eagleston was charged in count I of an indictment with stealing a motor vehicle on January 12, 1968, and transporting it in interstate commerce. On January 28, 1968, Eagleston together with one, Faubian, broke and entered a lady's garment shop and Eagleston and Faubian loaded the stolen apparel into a truck with Eagleston transporting the goods in interstate commerce. Both Eagleston and Faubian were charged in counts II and III of the indictment with violations of Federal statutes prohibiting distribution of stolen vehicles and stolen property in interstate commerce. Faubian complained of a misjoinder of defendants under Rule 8(b). The Eighth Circuit found that although Eagleston participated in the offenses charged in all three counts, it is without question that Faubian participated only in Counts II and III. Therefore there was a misjoinder of defendants and the conviction of Faubian was reversed.

In *Cupo v. United States*, D.C. Cir. 1966, 359 F.2d 990, the defendants were charged with a conspiracy to obtain merchandise on credit from certain stores by false statements. In addition, there was a joinder of separate charges against some defendants for substantive offenses alleged to be part of the same conspiracy, which joinder of offenses and defendants was proper. However, certain defendants were also charged with getting automobiles by false statements. The District of Columbia Circuit held that the joinder of the substantive charges of obtaining automobiles by false statements with charges of a conspiracy to get merchandise on credit from certain stores by false statements was impermissible where the offenses of getting automobiles were not alleged to be part of "the same act or transaction or * * * the same series of acts or transac-

tions as the conspiracy and, accordingly, even in absence of special prejudice appearing, the conviction had to be reversed as to the defendant who had raised the misjoinder issue.

Courts of Appeals other than the Fifth Circuit have adhered to the meaning and intent of Rule 8(b), F.R. Crim. P., by not permitting the government to misjoin defendants in an indictment or information. The conflicting decision of the Fifth Circuit is so patently erroneous and violative of Rule 8(b), that this Court should summarily reverse the judgment and decision under review.

2. Sections 401(a)(1) and 406 of Title II of the Comprehensive Drug Abuse, Prevention and Control Act of 1970 (21 U.S.C. §841(a)(1) and §846) are unconstitutional by reason of said sections not being within the power of Congress to enact under the Commerce Clause, Article I, §8, of the Constitution and as being an invasion of the States' residual police powers contrary to the Tenth Amendment.

(a) Congress exceeded the power granted by the Commerce Clause by prohibiting and making unlawful particular activities in controlled substances without requiring both allegation and proof that the particular activity involved in each individual case has affected interstate commerce.

(b) There was no rational basis for the Congressional findings and declarations set forth in Title II of the Act (21 U.S.C. §801).

This Court's determination of the constitutionality *vel non* of the challenged sections of the Comprehensive Drug Abuse, Prevention and Control Act of 1970, will

affect numerous pending cases filed under the questioned sections of the Act. The importance of a Supreme Court review cannot be gainsaid especially where the sections of the Act under which the petitioner was charged and the findings and declarations set forth in Section 101 of Title II, 21 U.S.C. §801, places the Federal Government four-square into intrastate narcotic activities.[3]

A reading of the challenged statutes and the indictment makes it abundantly clear that petitioner was charged in language which would make an intrastate offense a Federal felony. It is not necessary to allege under the questioned statutes that the controlled substance was imported or distributed in interstate commerce or affected said commerce.

Prior to the passage of the Drug Abuse, Prevention and Control Act, Congress did not pass a statute simply restricting the sale of narcotics pursuant to its Constitutional power to tax. Instead, Congress levied a tax on narcotics and made it a crime to sell and distribute non-tax paid narcotics. This effectively accomplished the Congressional purpose but within Constitutional limitations. In like manner, Congress, in order to prohibit the importation and sale of narcotics, pursuant to its power to regulate foreign commerce, passed statutes restricting the importation of narcotics into the United States. Again, this effectively accomplished the Congressional purpose, but within constitutional limitations.

In the Act under consideration, however, Congress made certain findings and declarations in order to reach

[3]The Congressional findings and declarations set forth in 21 U.S.C. §801, appear in Appendix A at pp. 6, 7.

all proscribed drug activities whether foreign, interstate or intrastate in character. 21 U.S.C. §801(1)(7). Notwithstanding the Congressional findings of fact and declarations contained in the Act, the constitutionality of the statutes in question are still, of course, subject to judicial inquiry to determine if said statutes are violative of the Constitution.

Congress has the power under the Commerce Clause to enact criminal laws to protect the instrumentalities of interstate commerce, to prohibit the misuse of the channels or facilities of interstate commerce, and to prohibit or regulate those interstate activities which have a demonstrably substantial effect on interstate commerce. Under the questioned statutes, however, a defendant can be convicted without any proof of interstate movement or the use of the facilities of interstate commerce, or of facts showing that his conduct affected interstate commerce. It is apparent that the Framers of the Constitution never intended that the national Government might define as a crime and prosecute wholly local activity through the enactment of Federal criminal laws.[4] But see, *Perez v. United States*, 402 U.S. 146, 28 L.Ed.2d 686, 694, 91 S.Ct. 1357. (Dissenting opinion, Mr. Justice Stewart).

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[4]In testimony given by Mr. Ingersoll, the former director of the Bureau of Narcotics and Dangerous Drugs before a subcommittee of the Committee on Interstate and Foreign Commerce, Mr. Ingersoll stated:

> "Our enforcement practices at the Federal level are not directed to the masses of people who may be involved in this kind of abuse. Our focus is on the illicit trafficking systems, the criminal conspiracies which engage in the wholesale interstate and international distribution of these substances. The effort that is made in respect to the kinds of people you are talking about is more properly, we feel, a State and local matter of concern . . . ."

Further, the obvious extension of Federal control into intrastate activities involving immense numbers of drug-related crimes will clearly alter federal-state relationships and overextend limited federal police resources. Cf. *Rewis v. United States*, 401 U.S. 808, 28 L.Ed.2d 493, 497, 91 S.Ct. 1056.[5]

Petitioner contends further that Amendment 10 of the United States Constitution is violated in that the police power reserved to the States is being infringed upon by the Act. The Act invades state's rights in the area of control of narcotics on an intrastate basis and, quite plainly, the state police rights in this area are replaced by Federal law and Federal power in contravention of the Constitution.

The foregoing testimony indicates clearly that the head of the Federal agency with the responsibility to enforce the Act did not want Congress to move into the area of intrastate narcotic violations. See Hearings before the Subcommittee on Public Health and Welfare of the Committee on Interstate and Foreign Commerce House of Representatives, Ninety-First Congress, Second Session on H.R. 11707 and H.R. 13743 at p. 127.

[5]In the case of *United States v. Bass*, U.S. , 30 L.Ed.2d 488, 92 S.Ct. , the indictment charged a violation of possession of firearms contrary to Section 1202(a)(1) of the Omnibus Crime Control and Safe Streets Act. It was not alleged in the indictment that the firearm in question had been possessed "in commerce or affecting commerce." The statute provides for the conviction of a felon "who receives, possesses or transports in interstate commerce or affected commerce . . . any firearm . . . shall be punished as prescribed therein." Since the statute did not reach possession of a firearm not shown to have been "in commerce or affecting commerce", the question of whether Congress has overstepped the Constitutional powers under the Commerce Clause was never reached.

CONCLUSION

For the foregoing reasons and authorities, a Writ of Certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies hereof were mailed to the Solicitor General, Department of Justice, Washington, D.C. 20530 this 18 day of July, 1972.

RICHARD M. GALE

APPENDIX

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-3248
Summary Calendar*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

AMADO LOPEZ and THOMAS LLERENA,
Defendants-Appellants.

Appeals from the United States District Court for the Southern District of Florida

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(May 11, 1972)

Before THORNBERRY, COLEMAN and INGRAHAM, Circuit Judges.

COLEMAN, Circuit Judge: Amado Lopez and Thomas Llerena appeal judgments of conviction entered in the United States District Court for the Southern District of Florida. We affirm.

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*Rule 18, 5th Cir.; See Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5 Cir., 1970, 431 F.2d 409, Part I.

In Count I of a three count indictment, both appellants were charged with conspiring to possess, with intent to distribute, approximately two kilograms of cocaine in violation of §401(a)(1) of Title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C., §841(a)(1), and with committing certain overt acts in furtherance of the conspiracy in violation of §406 of the same Act, 21 U.S.C., §846.[1] In Count II, Amado Lopez was charged with knowingly and intentionally distributing approximately two kilograms of cocaine, and in Count III with knowingly and intentionally distributing approximately 3.6 grams of heroin, both violations of §401(a)(1) of the aforementioned Act, 21 U.S.C., §841(a)(1).

Ample evidence support the convictions. Lopez received a seven year sentence and five thousand dollar fine on both Count I and Count II and a three year sentence and twenty-five hundred dollar fine on Count III. Sentences imposed on Count II and Count III were to run concurrently with the sentence imposed on Count I. Llerena was sentenced to imprisonment for eighteen months on Count I.

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[1]Section 401(a)(1) of the Act, 21 U.S.C., §841(a)(1) reads as follows:

§841. Prohibited acts A-Unlawful acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally —

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, controlled substance;

Section 406 of the Act, 21 U.S.C., §846 reads as follows:

§846. Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

Appellant's present seven issues for review, six of which concern certain rulings of the lower court during the course of the trial. We find no merit in these contentions.

Appellants also challenge the constitutionality of §401(a)(1) and §406 of Title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C., §841(a)(1) and §846. It is argued that Congress exceeded the power granted by the Commerce Clause, Article I, §8 of the Constitution of the United States, that is, by prohibiting and making unlawful particular activities in controlled substances without requiring both allegation and proof that the particular activity involved in each individual case has affected interstate commerce.[2] It is contended that the Act is invalid because it includes no provision for an independent inquiry in each case regarding the effect on interstate commerce of the particular activity involved.

Appellants also contend that these sections of the Act violate the Tenth Amendment of the Constitution of the United States, because, contrary to that amendment, they constitute an invasion of the state's residual police power.

The principles governing the resolution of the constitutional issues presented by this appeal have repeatedly been established.

The Tenth Amendment does not operate upon the valid exercise of powers delegated to Congress by the Commerce Clause. United States v. Barrow, 3 Cir., 1966, 363 F.2d

[2]The term "controlled substance" means a drug or other substance, or immediate precursor, included in schedule I, II, III, IV or V of part B of Subchapter I as set forth in 21 U.S.C, §812.

62, cert. denied, 385 U.S. 1001, 87 S.Ct. 703, 17 L.Ed.2d 541 (1967); see, also, Fernandez v. Weiner, 326 U.S. 340, 66 S.Ct. 178, 90 L.Ed. 116 (1945). If the passage of these sections of the Act was a valid exercise of those powers, no violation of the Tenth Amendment can occur.

It is well settled under the Commerce Clause that the power of Congress "extends to those activities intrastate which so affect interstate commerce, or the exertion of the power over it, as to make their regulation an appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce". United States v. Wrightwood Dairy Company, 315 U.S. 110, 62 S.Ct. 523, 86 L.Ed. 726 (1942), see, also, Perez v. United States, 402 U.S. 146, 91 S.Ct. 1357, 28 L.Ed.2d 686 (1971); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 85 S.Ct. 348, 13 L.Ed.2d 258 (1964).

A familiar exercise of that power is the regulation of intrastate activities which are so commingled with or related to interstate activities that all must be regulated if interstate commerce is effectively to be controlled. The fact that interstate and intrastate activities are commingled does not frustrate or restrict the power of Congress to protect and control that which is committed to its own care. United States v. Darby, 312 U.S. 100, 61 S.Ct. 451, 85 L.Ed. 609 (1941); Currin v. Wallace, 306 U.S. 1, 59 S.Ct. 379, 83 L.Ed. 441 (1939).

Consequently, where it is apparent that an attempt to separate interstate activities from intrastate activities would be a futile exercise substantially interfering with and obstructing the exercise of the granted power of

Congress to regulate interstate commerce, that attempt is not required. White v. United States, 1 Cir., 1968, 395 F.2d 5, cert. denied, 393 U.S. 928, 89 S.Ct. 127, 21 L.Ed.2d 115 (1968); White v. United States, 8 Cir., 1968, 399 F.2d 813.

While sometimes leaving to the courts the task of determining whether interstate commerce is affected by particular intrastate activities or whether an attempt to separate intrastate activities from those interstate would be a futile exercise, Congress, in passing this Act, has for itself made this determination.

The same determination was made by Congress in passing the Consumer Credit Protection Act of 1964 and the Drug Abuse Control Amendments of 1965 to the Federal Food, Drug and Cosmetic Act. There, Congress imposed sanctions upon certain classes of activities without requiring proof that the particular activity against which a sanction was imposed had an effect on interstate commerce. Congress has the power to make this determination and take this action, Perez v. United States, supra, at 152, 91 S.Ct. at 1360-1361; United States v. Cerrito, 7 Cir., 1969, 413 F.2d 1270, cert. denied, 396 U.S. 1004, 90 S.Ct. 554, 24 L.Ed.2d 266 (1970); Whalen v. United States, 8 Cir., 1968, 398 F.2d 286.

In Perez, for example, the Supreme Court rejected a contention, similar to the one advanced by appellants, that the Constitution required a determination on a case to case basis in prosecutions under Title II of the Consumer Credit Protection Act, 18 U.S.C., §891 et seq., that an extortionate credit transaction affected interstate commerce.

However, the fact that Congress has made this determination in passing the sections of the Act under which appellants have been convicted does not preclude further inquiry into the validity of this type legislation.

In making such an inquiry, however, a court's only function is to determine whether the certain class of activities regulated is within the reach of the federal power, i.e., that Congress had a rational basis for finding either that this certain class of activities in controlled substances has an effect on interstate commerce or that an attempt to separate intrastate activities in controlled substances from those interstate would be a futile exercise interfering with the power of Congress to regulate interstate commerce on such substances.

If it is within the reach of federal power, courts have no power "to excise, as trivial, individual instances" of the class. The contention that a court has this power in Commerce Clause cases has been put to rest. Perez v. United States, supra, at 154, 91 S.Ct. at 1361; Maryland v. Wirtz, 392 U.S. 183, 88 S.Ct. 2017, 20 L.Ed.2d 1020 (1968).

As the basis for the exercise of its power under the Commerce Clause to regulate certain activities in controlled substances, Congress made certain findings and declarations which are set forth in §101 of Title II of the Act, 21 U.S.C., §801.[3] Principal among these were the findings

[3]Section 101 of the Act, 21 U.S.C., §801 reads as follows:

§801. Congressional findings and declarations

The Congress makes the following findings and declarations:

(1) Many of the drugs included within this subchapter have a useful and legitimate medical purpose and are necessary to maintain the health and general welfare of the American people.

that intrastate incidents of the traffic in controlled substances, such as manufacture, local distribution and possession, had a substantial and direct effect on interstate commerce; that such intrastate incidents of the traffic in controlled substances swelled the interstate traffic in such substances; that it was impossible to distinguish between substances manufactured and distributed intrastate from

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(2) The illegal importation, manufacture, distribution, and possession and improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people.

(3) A major portion of the traffic in controlled substances flows through interstate and foreign commerce. Incidents of the traffic which are not an integral part of the interstate or foreign flow, such as manufacture, local distribution, and possession, nonetheless have a substantial and direct effect upon interstate commerce because —

(A) after manufacture, many controlled substances are transported in interstate commerce,

(B) controlled substances distributed locally usually have been transported in interstate commerce immediately before their distribution, and

(C) controlled substances possessed commonly flow through interstate commerce immediately prior to such possession.

(4) Local distribution and possession of controlled substances contribute to swelling the interstate traffic in such substances.

(5) Controlled substances manufactured and distributed intrastate cannot be differentiated from controlled substances manufactured and distributed interstate. Thus, it is not feasible to distinguish, in terms of controls, between controlled substances manufactured and distributed interstate and controlled substances manufactured and distributed intrastate.

(6) Federal control of the intrastate incidents of the traffic in controlled substances is essential to the effective control of the interstate incidents of such traffic.

(7) The United States is a party to the Single Convention on Narcotic Drugs, 1961, and other international conventions designed to establish effective control over international and domestic traffic in controlled substances.

those manufactured and distributed interstate and, therefore, it was not feasible to distinguish between such substances in terms of controls; and that control of the intrastate incidents of traffic in controlled substances was essential to the control of interstate incidents of that traffic. Obviously, there was a rational basis for these findings because they stemmed from statistical reports and extensive testimony as to the extent of the drug traffic and the unauthorized use of drugs. Moreover, Congress had a rational basis for finding that controlled substances manufactured and distributed on an intrastate basis could not be differentiated from those manufactured and distributed on an interstate basis.

A large percentage of controlled substances, especially those held or manufactured for illicit sale, are unlabeled, thereby making a determination of their source of origin extremely difficult or impossible. The form in which they are held or consumed adds to the difficulty or impossibility of this determination.

From such a finding, Congress could reasonably assume that an attempt to separate intrastate activities in controlled substances from those which were conducted on an interstate basis would be a futile exercise substantially interfering with its power to regulate interstate commerce in these substances; a power upon which any attempt to end or alleviate the drug abuse problem would necessarily be based.

Past attempts to regulate interstate commerce in controlled substances had failed because of the difficulty or impossibility of determining the substance's source of origin. To make another attempt at controlling interstate

commerce in controlled substances without regulating both intrastate and interstate activities in these substances would be ineffective.

Appellants' reliance on United States v. Bass, 404 U.S. 336, 92 S.Ct. 515, 30 L.Ed.2d 488 (1971) is of no help. The Supreme Court held in Bass that to establish a violation of 18 U.S.C. App., §1202(a) there must be proof that the receipt, possession, or transportation of a firearm affected interstate commerce.

In our opinion, this has no effect on the constitutionality of §401(a)(1) and §406 of Title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C., §841(a)(1) and §846. These sections contain no language analogous to Bass which would require that the activity in controlled substances be shown to have an effect on interstate commerce. In the Act now under review Congress clearly expounded its purpose and plainly made it a federal crime simply to engage, except as authorized by the Act, in the manufacture, possession, or distribution of controlled substances. We hold that Congress acted within the power granted to it under the Commerce Clause when it enacted §401(a)(1) and §406 of Title II of the Act in question, 21 U.S.C., §841(a)(1) and §846.

The judgments of conviction against the appellants are

AFFIRMED.

APPENDIX B

[TITLE OMITTED]

Appeals from the United States District Court for the Southern District of Florida

Before THORNBERRY, COLEMAN and INGRAHAM, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgments of the said District Court in this cause be, and the same is hereby, affirmed.

May 11, 1972

Issued as Mandate: Jun 30, 1972

(As to Thomas Llerena Only)

APPENDIX C

[TITLE OMITTED]

Filed June 19, 1972

ON PETITIONS FOR REHEARING

Before THORNBERRY, COLEMAN and INGRAHAM, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petitions for rehearing filed in the above entitled and numbered cause be and the same are hereby DENIED.

APPENDIX D

[TITLE OMITTED]

JUDGMENT AND COMMITMENT

On this 5th day of October, 1971, came the attorney for the government and the defendant appeared in person and by Counsel, Frankin Kreutzer, Esq.

It Is Adjudged that the defendant upon his plea of Not Guilty and a Court finding of Guilty, has been convicted of the offense of combining, conspiring and agreeing to possess with intent to distribute approximately TWO KILOGRAMS of cocaine, a Schedule 11 Narcotic Controlled Substance, in violation of Title 21 United States Code Section 841 (a)(1). as charged In Count One of the indictment. and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of EIGHTEEN (18) MONTHS, or until otherwise discharged by due process of law.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

s/ PETER T. FAY
United States District Judge

The Court recommends commitment to:

_____
Clerk

APPENDIX E

[TITLE OMITTED]

INDICTMENT

The Grand Jury charges that:

COUNT I

From on or about May 6, 1971, continuing until on or about July 19, 1971, at Miami, Dade County, in the Southern District of Florida,

AMADO LOPEZ and

THOMAS LLERENA

and others not named in the indictment and presently to the Grand Jury unknown did combine, conspire, and agree to possess with intent to distribute approximately two kilograms of cocaine, a Schedule II narcotic-controlled substance; in violation of Title 21, United States Code, Section 841(a)(1).

It was further part of the conspiracy that the defendant would conceal the existence of the conspiracy and would take steps designed to prevent the disclosure of their activities.

That the defendants heretofore named did commit in furtherance of said conspiracy and to effect the objects thereof the following overt acts:

OVERT ACTS

1. On or about July 3, 1971, at Miami, Florida, Amado Lopez met with a cooperating individual.

2. On or about July 16, 1971, at Miami, Florida, Amado Lopez and Thomas Llerena met with a Special Agent of the Bureau of Narcotics and Dangerous Drugs.

3. On or about July 19, 1971, at Miami, Florida, Amado Lopez met with a Special Agent of the Bureau of Narcotics and Dangerous Drugs.

All in violation of Title 21 United States Code Section 846.

COUNT II

On or about July 3, 1971, at Miami, Dade County, in the Southern District of Florida.

AMADO LOPEZ

did knowingly and intentionally distribute approximately two (2) kilograms of cocaine, a Schedule II narcotic-controlled substance; in violation of Title 21, United States Code, Section 841 (a) (1).

COUNT III

On or about May 6, 1971, at Miami, Dade County, in the Southern District of Florida.

AMADO LOPEZ

did knowingly and intentionally distribute approximately 3.6 grams of heroin, a Schedule I narcotic-controlled substance; in violation of Title 21 United States Code, Section 841(a)(1).

A TRUE BILL

s/ Carrio D. Bufario
FOREMAN

ROBERT W. RUST

UNITED STATES ATTORNEY

s/ Harold F. Keefe

By: Harold F. Keefe
Assistant U.S. Attorney

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72–103

THOMAS LLERENA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

An indictment filed in the United States District Court for the Southern District of Florida charged petitioner and Amado Lopez with conspiracy to possess and distribute two kilograms of cocaine (count 1), in violation of 21 U.S.C. 846. In addition, Lopez was charged with distributing the cocaine (count 2) and with distributing 3.6 grams of heroin two months prior thereto (count 3), in violation of 21 U.S.C. 841 (a)(1). Following a trial by jury, both defendants were convicted as charged. On October 5, 1971, petitioner was sentenced to imprisonment for eighteen months. The court of appeals affirmed (Pet. App. A; 459 F. 2d 949). A petition for rehearing was denied on June 19, 1972; this petition was filed on July 18, 1972.

The evidence, which is not in dispute, shows that on May 6, 1971, Lopez gave an informant a sample of heroin. On July 3, the informant received two kilograms of cocaine from Lopez. Two weeks later an undercover narcotics agent arranged to meet with Lopez at a hotel in order to pay for the cocaine. At the meeting both petitioner and Lopez were present, and the agent made a partial payment, agreeing to pay the remainder later. Petitioner stated that he was very anxious about getting paid because certain unnamed persons would kill anyone who crossed them.

1. Petitioner claims prejudice in joining him with Lopez at a single trial which involved a count not connected to petitioner, *i.e.*, count 3 relating to the heroin transaction. The evidence relating to that count was distinct although it did serve to explain the later dealings. The court properly instructed the jury to determine the guilt or innocence of each defendant separately. There is no reason to speculate that the jury failed to heed this charge. *Gordon* v. *United States*, 438 F. 2d 858, 878–879 (C.A. 5), certiorari denied, 404 U.S. 828.

2. Petitioner also challenges the constitutionality of the Comprehensive Drug Abuse Prevention and Control Act, under which he was convicted, because it does not require proof of a nexus with interstate commerce as a condition for conviction of a federal offense. The constitutional question is akin to the one advanced unsuccessfully by the defendant in *Perez* v. *United States*, 402 U.S. 146, where this Court reaffirmed prior rulings that the Commerce Clause can reach wholly intrastate activities where, as a class, they have a sub-

stantial effect upon interstate commerce. This is so whether or not an individual situation can be shown to bear such a connection. There can be little doubt that the statutory scheme which includes 21 U.S.C. 841 and 846 deals with matters having a profound effect on interstate commerce. This determination by Congress, reached after extensive examination into the vice of narcotics trafficking, has been codified in the form of explicit legislative findings. See 21 U.S.C. 801. In light of the rational basis for the particularized Congressional findings, the Comprehensive Drug Abuse Prevention and Control Act is valid federal legislation.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

AUGUST 1972.

U.S. GOVERNMENT PRINTING OFFICE 1972